

July 28, 2003

MAINE PUBLIC UTILITIES COMMISSION
Selection of Conservation Service Provider
(Chapter 381)

NOTICE OF RULEMAKING

I. SUMMARY

In this rulemaking, we propose a rule to establish procedures governing the selection of service providers for conservation programs. The Commission will contract with service providers to deliver and assist with the delivery of conservation programs to Maine's transmission and distribution (T&D) utility customers. We propose to select most service providers by means of a competitive bid process that will be conducted by issuing Requests for Proposals (RFPs) or similar documents. We also propose to select some service providers without a competitive bid process, when such sole-source contracting is the most efficient means to deliver conservation programs, or (for example) when low-income customer programs can be delivered by groups that the T&D utilities already used to deliver such services.

II. BACKGROUND

P.L. 2001, ch. 624 (the Conservation Act) directs the Commission to develop and implement electric energy conservation programs that are consistent with the goals and objectives of an overall energy conservation program strategy that the Commission must establish. The programs must be cost effective, according to a definition that the Commission also must establish.

The Commission may arrange delivery of conservation programs by contracting with service providers. 35-A M.R.S.A. § 3211-A(3). In the Conservation Act, "service provider"

[m]eans a public or private provider of energy conservation services or an entity selected by the Commission to contract with such providers or otherwise arrange the delivery of conservation programs.

35-A M.R.S.A. § 3211-A(1)(G).

The Act directs the Commission to select service providers through a competitive bid process. 35-A M.R.S.A. § 3211-A(3)(A). Subsection 3211-A(3)(C) describes circumstances under which the Commission may select service providers without a competitive bid process. While the Commission is not subject to rules adopted by the

State Purchasing Agent in selecting service providers, we must adopt our own rule establishing procedures governing the selection of service providers. 35-A M.R.S.A. § 3211-A(3). We are directed to consult with the State Purchasing Agent in developing our rule. The rule we adopt to govern selection of service providers is designated a routine technical rule under the Administrative Procedure Act. See 5 M.R.S.A. chapter 375, subchapter II-A.

The Commission opened an Inquiry (Docket No. 2002-272) in order to obtain information and comments from interested persons about our rule concerning the selection of service providers.¹ We asked for general comments and also posed a set of questions that we asked commenters to address in written responses. The questions, pertaining to provisions that should govern the bidding and selection process, asked the extent to which bid criteria should be established in the rule or left to each Request for Bids (RFBs),² whether bids could or should be based on objective criteria like price, and if not, what subjective criteria should be used, and last, whether T&D affiliates should be allowed to bid to become service providers in the T&D service territory.

Central Maine Power Company (CMP), Bangor Hydro-Electric Company (BHE), Maine Community Action Association (MCAA), the Office of the Public Advocate (OPA), and Combined Energies, (a division of Union Water Power Company, an affiliate of CMP) filed written comments.

CMP stated that price should be a prime consideration but that other evaluation criteria should also be considered, including technical expertise, experience in the industry and dealing with the relevant customer classes, qualifications of key personnel and satisfactory references. CMP added that criteria should vary from program to program, so the evaluation criteria should be established in the RFB rather than the rule. CMP also asserted that utility affiliates should be permitted to participate in all bid processes. As the Commission will be selecting the winning bidders, in CMP's view, there could be no chance for an unfair advantage to be given the affiliate.

BHE commented that the bidding system should be designed to give preferences to in-state providers. The rule should be written so that it affords flexibility within the RFBs. BHE also stated that bids should not be judged only on price and that affiliates should be allowed to bid.

Likewise, MPS stated that flexibility was essential in evaluating bids and that it was not desirable nor practical to select on price alone. MPS recommended that the

¹ The Inquiry also sought comments on the definitions of small business consumers and low income residential consumers, other provisions for which the Legislature directed the Commission to promulgate rules. Small business consumers and low-income residential consumers were defined by rule in a rulemaking that was initiated on August 20, 2002 and adopted as a rule and made effective on December 9, 2002. Order Adopting Rule, Docket No. 2002-473 (November 6, 2002).

² Throughout this document the terms Request for Bids (RFBs) and Request for Proposals (RFPs) are used interchangeably.

Commission be able to determine the details of the bid process in the RFB rather than rule.

MCAA commented on the provisions that govern the selection of service providers for low-income residential customers. Service providers for programs directed at low-income customers should be knowledgeable of the problems, needs and special circumstances of low-income households and should be experienced in working with such households. MCAA added that the Commission's rule should provide that low-income program service providers be able to coordinate delivery of conservation programs with other programs for which low-income households are eligible. Low-income service providers should also display an organizational commitment to bettering the lives of low-income persons. In MCAA's view, the Commission should have flexibility to set bid criteria in the RFBs. Moreover, the Commission should be inclined to bypass the bid process for delivery programs to low-income households. Last, MCAA opposes using T&D affiliates as service providers because of T&D utilities' financial disincentive to encourage electricity conservation.

The OPA stressed the need for flexibility. The Commission should be guided by its experience in the standard offer bidding process and more generally by its experience in contracting for goods and services. In evaluating bids, the OPA recommended that experience and expertise be the principal qualifications. The OPA noted that experience and expertise counts for 50% of total points in its evaluation of bids for consulting services, while cost counts 25%. The OPA also stated that, because of the subjective nature of selecting conservation program service providers, the Commission should use a team of evaluators. The entire team should evaluate using the same format. The team should strive for a consensus recommendation but perform individual and independent evaluations. The OPA was concerned about T&D affiliates winning contracts and then sharing employees or facilities with the T&D utility. The OPA also stated that, because of the utility's disincentive to reduce consumption, the affiliate may not do a good job as service provider. The OPA suggested that utility affiliates could start with a score of -5 (minus five), presumably on a scale of 100, to account for this possibility.

Combined Energies stated that utility affiliates should be allowed to participate, but that utility affiliates should earn the business just like any other bidder. Combined Energies commented that historical performance should be the most important evaluation criterion. Combined Energies also stated that the low bid frequently does not result in best performance or lowest life-cycle costs. It recommended that the Commission be innovative and creative in adopting "alternative delivery mechanisms" or other "best value" contracting methodologies.

The Commission held a public meeting on this Inquiry on June 26, 2002. Dick Davies appeared on behalf of MCAA. Linda Viens appeared on behalf of CMP. Rich Rusnica appeared on behalf of BHE. Steve Ward, the Public Advocate, also appeared. All commenters at the public meeting generally agreed that the Commission's service provider selection process rule should provide the Commission flexibility and that

non-price considerations and reputation should be as important if not more important than price. There was also some sentiment that in-state providers should be favored.

We will discuss the Docket No. 2002-272 comments in the course of the section-by-section discussion of our proposed rule.

The Commission's Director of Energy Efficiency Programs and other members of the Commission Staff who serve on the Energy Efficiency Team met with the State Purchasing Agent at that time, Richard Thompson, on August 8, 2002. Other Staff from the Division of Purchases also attended the meeting. The meeting attendees discussed the Division of Purchases' Rules For Purchase of Services and Awards (Chapter 110 of the Department of Administration and Financial Services Rules, 18-554 C.M.R. 110), as well as the Bureau of General Services' Rule for Appeal of Contract and Grant Awards (Chapter 120 of DAFS's Rules 18-554 C.M.R. 120). The attendees also discussed the Commission's use of competitive bidding processes in implementing some of the interim conservation programs. We will discuss DAFS Rules and other issues raised during our consultation with the State Purchasing Agent in the section-by-section description of the draft rule.

III. DISCUSSION OF INDIVIDUAL SECTIONS

1. Section 1: General Provisions and Definitions

Subsection A states the purpose of the proposed rule, to establish the procedures governing the selection of service providers of conservation programs.

Subsection B contains the definitions for the proposed rule.

Subsection 1 defines "aggrieved person" in a manner similar to the definition of the same term in DAFS rule, Chapter 120. The Commission has not included the words "financially, professionally and personally" to modify the term "adversely affected," that are included in the DAFS Chapter 120 definition. The words "financially, professionally or personally" are not included because the additional words "financially" and "professionally" appear unnecessary and "personally" adds a concept that is too subjective. For purposes of our rule, only *bidders* who are adversely affected are "aggrieved."

The definition of "conservation programs" is taken directly from the Conservation Act.

The definition of "Contract Review Committee" is taken from the definitional section of DAFS Chapter 110, Rule for the Purchase of Services and Awards.

The definition and concept of “Program Opportunity Notice” is taken from the New York State Energy Research and Development Authority (NYSERDA) the state agency that sponsors conservation programs in New York.

The definition of “Request for Proposal” is similar to that in the DAFS Chapter 110. The term “Request for Qualifications” is similar to “Request for Proposals,” but with the focus on technical qualifications only. The DAFS Rules do not have a similar provision for RFQs, but the concept has been commonly used in the conservation services arena.

The first sentence of the definition of service provider is taken directly from the Conservation Act. The second sentence is intended to clarify that “service providers” may only constitute part of the delivery mechanism of a conservation program, such as firms that process or pay coupons and rebates, and that the evaluation function is an integral part of a conservation program, so a firm that performs a program evaluation function is likewise a “service provider.”

The other definitions are self-explanatory.

2. Section 2: Competitive Procurement

Subsection A begins with the statutory presumption that service providers will be selected using a competitive bidding process. 35-A M.R.S.A. § 3211-A (3)(A).

Subsections B through E generally describe RFPs, RFQs, PONs and the process that will be used in issuing them, in answering questions about them and submitting bids in response to them. The DAFS Chapter 110 (Rules for the Purchase of Service and Awards) contains similar provisions, as do the standard offer bidding provisions within our Chapter 301. In general, we have followed the advice of Docket No. 2002-272 commenters so that the rule provides flexibility in writing and processing RFPs.

We note a provision within Subsection E, Submission of Bids. We state that during the evaluation and bid award process, bids will be treated as confidential and not subject to public disclosure. However, after the notification of the contract award, we propose to make all bids public documents and subject to disclosure under the Freedom of Access Act. 1 M.R.S.A. § 401–417. The Division of Purchases treats bids that it receives as State Purchasing Agent to be public documents. In our standard offer bid process, we treat bids as confidential and subject to a protective order. Standard offer bidders seek such treatment and note that such confidential treatment is typically granted to power supply bids in the private sector. We learned during competitive bid processes conducted in the interim program period that potential bidders in the conservation arena do not have the same expectations about confidential treatment of their bids, except during the evaluation process. We do not believe that the failure to grant confidential treatment will cause conservation service

providers NOT to bid in our bidding processes. Therefore, we propose to make all bids received subject to public disclosure.

Subsection F is taken from our Chapter 301. Chapter 110 of the DAFS Rules similarly excludes late submitted bids. Subsection F also provides that the Commission may reject all bids because the price is unreasonably high or because acceptance would not be in the public interest. We believe that the Commission must have the discretion to decide that none of the bids is qualified.

Subsection G deals with the evaluation of bids and the selection of winning bidders. Subsection 1 establishes a Proposal Review Team to evaluate the bids. The Commission's Director of Energy Efficiency Programs will be the Chair of each Proposal Review Team unless he/she designates a substitute. We propose to delegate the selection process of service providers because such evaluation will be particularly detailed and fact-specific and will not present important questions of regulatory policy that are often presented, for example, in the standard offer context.

We propose a team approach for this delegated task of evaluation because, as the OPA suggested in its Docket No. 2002-272 comments, the subjective nature of selecting conservation program service providers lends itself to a team approach. Moreover, the work of the Commission staff is typically carried out in teams and thus staff is adept at using a team approach. A team approach will also permit the Director to include persons from outside the Commission when warranted.

Subsection G (2) deals with selection criteria. Costs, experience and qualifications, and responsiveness to the solicitation are typically included in RFPs issued through the Division of Purchases and their inclusion is consistent with the advice received in our Inquiry, Docket No. 2002-272. "Promoting the development of resources, infrastructure and skills within the State, to the extent practicable," is taken from the Conservation Act. We add a provision for the Director to include other selection criteria because, in our view, it is important to maintain such flexibility. The weight to be given each of the selection criteria is left to the RFP. By allowing the Director to add selection criteria and by assigning the weight to be given each of the criteria within the RFP document, we have followed CMP's advice to establish evaluation criteria in the bid document rather than the rule.

Subsection G (3) provides that all members of a Proposal Review Team will provide written documentation of his/her bid evaluation.

Subsection G (4) provides that the Proposal Review Team may ask for additional data from bidders, may review past assignments or check with prior clients of the bidders, or schedule interviews or meetings with bidders. Given the subjective nature of selecting program service providers, these post-bid submission activities can be important in making the best contract award decision. Subsection 4 permits all of these activities to be conducted for a subset of the bidders rather than all bidders. Our standard offer bid experience has taught us that the ability to narrow the evaluation

process to a “short-list” of finalists can be necessary to make the selection process manageable.

Subsection G (5) permits the Proposal Review Team to conduct limited discussions or negotiations and thereafter seek amendments to the bids as a result of the discussions and negotiations. These provisions add the kind of flexibility that the Docket No. 2002-272 Inquiry commenters recommended, so that the selection results will be improved while keeping the bid process fair. Like Subsection G (4) and (5) permits such limited discussions and negotiations to take place as to a subset of bidders rather than the entire set of initial bidders.

Subsection G (6) provides that the Proposal Review Team may select more than one winning bidder and that the winner or winners shall be the proposal or proposals that score the highest on the Proposal Review Team analysis.

Subsection G (7) provides that a Proposal Review Team may reject a bid that contains false or misleading material information. The Commission should be authorized to reject and otherwise remove from further consideration and analysis any bid that contains false or misleading material information. Subsection 7 also authorizes the Contract Administrator to bar from future bid participation a bidder that has submitted false or misleading and material information. We believe that Subsection 7 will lead to greater efficiency because the Proposal Review Team can cease further evaluation of a bid that contains material false or misleading information. Barring such offending bidders from future bidding will protect the integrity of the bid process.

Subsections G (8) and (9) ensure that bidders receive notice of a contract award at least 14 days before a contract will be entered into with the winning bidder.

Subsection G (10) and (11) provide that the Contract Review Committee must approve the executed contract and that such contract is not effective until the date of approval. For procurement of services subject to DFAS Rule Chapter 110, the Contract Review Committee reviews and approves the selection of the winning bidder as well as the contract itself. During our meeting with the State Purchasing Agent, we discussed the Contract Review Committee and its approval of written contracts. Based upon those discussions, we propose to submit the written contracts for review and approval. It is only the written contract itself which is subject to approval. Consistent with the statute and the proposed rule, the selection of the service provider is not subject to Contract Review Committee approval. We invite comments, particularly from the State Purchasing Agent or Division of Purchases, on whether the provision requiring Contract Review Committee approval of contracts is warranted when the contractor selection decision is not reviewable.

Subsection H delegates the decisions necessary to conduct competitive solicitations for conservation program service providers to the Director of Energy Efficiency Programs.

Our proposed sections on competitive procurement do not contain any special provisions for T&D utility affiliates. Thus, we propose that affiliates be eligible to bid and be treated like any other bidder. As the Commission will administer the bid process, we agree with CMP that there is no actual or apparent unfair advantage to allowing an affiliate to bid. The Commission already has a rule (Chapter 820) that prohibits the regulated utility from subsidizing unregulated activity. We believe our existing regulatory and enforcement authority is sufficient to prevent cost subsidization and any attempt of intentional poor contract performance by an affiliate service provider.

3. Section 3: Other Types of Solicitation

Section 3 deals with solicitations of service providers without using a competitive bidding process. The general provision, as stated in the first paragraph of Section 3, is taken from the Conservation Act. 35-A M.R.S.A. § 3211-A(3)(C)(1). Subsections A and B define the other types of solicitations that can be used to select service providers and to describe the circumstances under which the non-competitive solicitation process “will promote the efficient and effective delivery of conservation programs and is consistent with the objectives and overall strategy of the Conservation Program.” 35-A M.R.S.A. § 3211-A(3)(C)(1).

Subsection A allows for so-called open solicitations. This kind of solicitation process will allow the Commission to establish a conservation program using multiple service providers. We believe that there will be some types of programs that will be “efficiently and effectively delivered” using such an approach.

Subsection B describes the circumstances in which the Commission may choose a single or limited number of service providers without engaging in a competitive bidding process. Subsection B requires a finding of at least one of the three circumstances to warrant the use of a sole source procurement process. Because the use of sole source procurement is the exception rather than the rule, decisions to use a sole source procurement for contracts over \$10,000 remain with the Commission and are not delegated to the Director of Energy Efficiency Programs.

Subsection C deals with low-income service providers and is taken directly from the Conservation Act.

4. Section 4: Types of Agreements

Section 4 describes the types of contracts or agreements that the Commission will use with various types of service providers such as private entities, public agencies or universities.

5. Section 5: Appeals

Section 5 deals with appeals of contract award decisions. Subsections A, B and C, concerning the appeal process and the standard for review of

contract award decisions, are taken from Chapter 120, Rules for Appeals of Contract and Grant Awards Promulgated by the Department of Administrative and Financial Services, Bureau of General Services.

The Commission can reconsider any decision based on the criteria in the rule. As the agency responsible for administering and implementing the Conservation Act, it is proper for the appeal function to be placed with the Commission.

Subsections D and E deal with the nature of an appeal proceeding. Appeals will be nonadjudicatory proceedings and will follow a process as established by a presiding officer assigned to the appeal. The presiding officer will decide the proper procedure for evaluating and resolving the claims made by the appellant.

Subsection G provides that the Commission will not make an alternative contract award decision as a result of any appeal. The various possible future actions are stated.

6. Section 6: Waivers or Exception

Section 6 contains a standard waiver or exemption clause.

IV. FISCAL AND ECONOMIC EFFECTS

"Fiscal Impact" is defined in 5 M.R.S.A. § 8063 as "the estimated cost to municipalities and counties for implementing or complying with the proposed rule." In accordance with 5 M.R.S.A. § 8057-A(1), the Commission expects no fiscal impact on municipalities or counties. However, we invite all interested parties to comment on the fiscal impact and all other implications of this Proposed Rule.

V. PROCEDURES FOR THIS RULEMAKING

This rulemaking will be conducted pursuant to the procedures of 5 M.R.S.A. §§ 8051-8058. A public hearing on the proposed rule will be held on Tuesday, August 26, 2003 at 1:30 p.m. at the Public Utilities Commission. Written comments on the proposed rule may be filed with the Administrative Director until September 8, 2003. However, the Commission strongly recommends that comments be filed by August 21, 2003 to allow for follow-up inquiries during the hearing. Supplemental comments may be filed after the hearing. Written comments should refer to the docket number of this proceeding, Docket No. 2003-517, and be sent to the Administrative Director, Public Utilities Commission, 18 State House Station, Augusta, ME 04333.

Please notify the Public Utilities Commission if special accommodations are needed to make the hearing accessible to you by calling 1-207-287-1396 or TTY-1-800-437-1220. The Commission must receive requests for reasonable special accommodations 48 hours before the scheduled event.

Accordingly, we

ORDER

1. That the Administrative Director shall notify the following of this rulemaking proceeding:

- a. All T&D utilities in the State;
- b. All interested persons in Docket Nos. 2002-161, 2002-162 and 2002-272; and
- c. All persons who have filed with the Commission within the past year a written request for Notice of Rulemaking;

2. That the Administrative Director shall send copies of this Notice of Rulemaking and attached proposed rule to:

- a. The Secretary of State for publication in accordance with 5 M.R.S.A. § 8053(5); and
- b. The Executive Director of the Legislature Council, 115 State House Station, Augusta, Maine 04333-0115 (20 copies).

Dated at Augusta, Maine, this 28th day of July, 2003.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
 Diamond
 Reishus

This document has been designated for publication